No. 21227

In the United States Court of Appeals For the Ninth Circuit

KENNETH MCCLARTY,

Appellant,

vs.

STEWART L. UDALL,
Secretary of the Interior, et al,

Appellees.

Supplemental (Reply) Brief of Appellant

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

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This brief is submitted pursuant to order of the court filed in this cause November 26, 1968, and strictly in response to the citation to *United States v. U. S. Minerals Development Corporation*, 75 I.D. 127 (April 30, 1968) furnished to the Clerk of the Court of Appeals for the Ninth Circuit for insertion in the Government's brief by Mr. Marquis of counsel for appellees. (See Addendum "A") It is the position of appellant that this supplemental brief, is in the nature of a brief in reply to the appellees' answering brief.

This brief has been made necessary because in the *U. S. Minerals Development Corporation* opinion the Department of the Interior has set forth an extended discussion of this case and has also articulated for the first time a new formula for determination of "uncommon varieties" under 30 U.S.C. § 611.

DISCUSSION OF McCLARTY V. UDALL IN THE U. S. MINERALS OPINION

Discussing the *McClarty* case in *United States v. U. S. Minerals Development Corporation, supra,* the Department of the Interior recognizes that most of the stone from the Snoqueen deposit was regular in size and shape, did not require as much cutting or shaping and that the deposit had an economic advantage over other deposits because of this concentration of naturally fractured, regularly shaped stone. (75 I.D. at 131, 132, 133). It was also recognized that this was a unique characteristic of the deposit. (75 I.D. at 133). The appellant has no argument with the Department's view of the facts on these points. However, other contentions which cannot be supported are made as to the facts of the *McClarty* case.

The opinion states that the naturally fractured stone in the Snoqueen deposit is not distinguishable from stone found in other deposits in the area. (75 I.D. at 131). It is obvious that this statement disregards the property of the Snoqueen deposit which is the principal source of its value as building stone and is conceded to be a unique characteristic, namely, the predominant fracturing or jointing which produces long narrow slabs of stone with faces intersecting at nearly right angles. (A. Tr. 54-56, 62, 81, 137, 140, 141, A. Ex. "A" —Ritchie letter). This is also apparent from other contentions made in the opinion to the effect that no

special value because of this fracturing had been recognized in actual usage (75 I.D. at 132), that there was no evidence that in use of the stone in the building trade any significant value had been attributed to it because of this jointing (75 I.D. at 133), and that this characteristic did not give distinct and special value because a purchaser would not pay any more for it than for a stone which had to be cut to shape and that it would make no difference to a purchaser how the shape of the stone was achieved, whether by natural fracturing or fabrication. (75 I.D. at 133). The weakness of these contentions, besides their patent absurdity is, of course, that they are not supported by substantial evidence and that the only competent evidence on the point is to the contrary.

The uncontradicted evidence is that stone from the Snoqueen deposit is faster, easier and more economical to use (A. Tr. 122-123, 126-127). The difference between the market value of Snoqueen stone and common stone (A. Tr. 104) is also uncontradicted. To state that a purchaser will not pay more for regularly and desirably fractured stone than for stone which has to be cut to shape and that such a purchaser will be indifferent to whether the shape of a stone has to be achieved by natural fracturing or fabrication is not only unsupported in the record and contrary to the evidence but defies common sense. Obviously, if cutting and shaping must be done by the purchaser, then such stone will be less valuable to him than stone which does

not require cutting and shaping. On the other hand, if cutting and shaping is done by the seller rather than the purchaser, the expense of that processing may be a matter of indifference to the purchaser, but obviously the desirable fracturing would then have considerable value to the seller even though it might not be reflected by a market price higher than that for manufactured or processed material.

THE NEW FORMULA OF THE U. S. MINERALS OPINION

In recognition of the holding of *United States v. Coleman*, No. 630, 390 U.S. 599, 88 Sup. Ct. 1327 (April 22, 1968), the Department of the Interior in *United States v. U. S. Minerals Development Corporation, supra*, held that the 1955 Amendments to the Materials Act removed "common varieties" of building stone from the coverage of the mining laws, but left building stone that has "some property giving it a distinct and special value" still subject to location under the mining laws. (75 I.D. at 130). In fact the Supreme Court left 30 U.S.C. § 161 entirely effective as to such building stone. The Supreme Court opinion in the *Coleman* case is, of course, not definitive as to what properties a building stone deposit must have to remove it from the class of "common variety" materials. In *Coleman* the facts were significantly different and the deposits involved were of stone identical to that found in immense quantities in the area outside the claim.

Consequently, the attempt of the Department of the Interior in the *U. S. Minerals* case to establish a test to determine whether or not a deposit is of a "common variety" stone requires closest scrutiny. Before examining the criteria which the Department of the Interior attempts to establish in that opinion, it is essential to examine the legislative history of 30 U.S.C. § 611.

LEGISLATIVE HISTORY

Sec. 611 of 30 U.S.C. (§ 3 of the Act of July 23, 1955, 69 Stat. 368) in bill form was § 3 of H.R. 5891. This bill was reported in House Report 730, 2 U. S. Code Congressional & Administrative News, p. 2474. The report indicates that abuses of the mining laws by persons locating claims for other than bona fide mining activities was a prime concern of Congress in enacting this legislation. This is revealed in the following passages from the report:

> "The Committees on Interior and Insular Affairs of both the House and Senate have in the past several years been made increasingly aware of the abuses under the general mining laws by those persons who locate mining claims on public lands for purposes other than that of legitimate mining activity." U. S. Code Congressional & Administrative News, Vol. 2, 84th Congress, 1st Session, 1955, page 2478.
>
> "There is, however, agreement that any corrective legislation providing for multiple use of the surface of the same tracts of public lands, compatible with unhampered subsurface resource development, must be aimed at—
>
> "First, prohibiting location of mining claims

> for any purpose other than prospecting, mining, processing and related activities;
>
> "Second, providing for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands; and
>
> "Third, accomplishing these desirable ends without materially changing the basic concepts and principles of the general mining laws.
>
> "H.R. 5891 is, in the view of the Committee on Interior and Insular Affairs, responsive to the need for corrective action outlined." *Id.* 2480.

It is apparent then that the intent of Congress was to prohibit locations of sand, gravel and stone only insofar as necessary to prohibit location of claims for other than legitimate mining activities while at the same time avoiding a material change in the basic concepts and principles of the mining law, which laws would, of course, include 30 U.S.C. § 161, the building stone statute. This legislative history makes it clear that while a common variety of stone which is no different than any other stone found in the area is not removed from the "common varieties" classification simply because it is capable of being used as building stone, where a deposit of stone has some property not generally found which makes that deposit valuable as building stone and suitable for bona fide mining operations, then that deposit should be subject to location under the mining laws just as before.

THE NEW FORMULA

It is in the light of this legislative history that the rule formulated by the Department of the Interior in *United States v. U. S. Minerals Development Corporation, supra,* must be considered. The two basic criteria which must be shown for sand, stone or gravel to be classified as an "uncommon variety", are stated to be as follows:

1. It must have a unique property.
2. The unique property must give the deposit a distinct and special value. (75 I.D. at 134).

"Unique" Property v. "Some" Property

The requirement of a "unique property" is improper, particularly in view of the language of 30 U.S.C. § 611 which requires only that "some property" give a deposit distinct and special value. There is no justification in the literal language of the statute nor in the purposes for which it was enacted for this extreme narrowing of the concept of the type of property which a deposit must have to escape classification as a "common variety." However, even if the "unique property" criterion were applied in the instant case, it would not preclude upholding location of the Snoqueen deposit in view of the concession in the *U. S. Minerals* opinion that the concentration of natural fracturing found in Snoqueen was a unique characteristic of the deposit. (75 I.D. at 133).

A Distinct and Special Value—Uncommon Uses

The second criterion as to distinct and special value is viewed as establishing a requirement for a causal relationship between the property in question and the value of the deposit. This relationship, according to the *U. S. Minerals* opinion may be established by showing that the deposit has value for some use to which common varieties of the mineral in question cannot be put. Stone from the Snoqueen deposit has in fact been used in a unique way by putting together irregular shapes which are both flat and vertical. (A. Tr. 188). Consequently, it is submitted that the record establishes the necessary relationship between the particular property of the deposit and its value even under this new test.

Distinct and Special Value — Common Uses

Under the new formula where the mineral is put only to the same uses as common varieties, the deposit in question is to be compared with other deposits of such minerals. (75 I.D. at 132). This, presumably, would require a comparison of the Snoqueen deposit with other andesite deposits in the White Pass area. However, the Department has imposed on this requirement the further restriction that the only evidence on which such a comparison can be based is a market price differential between the deposit in question and other deposits which lack the property or properties alleged to give the deposit distinct and special value. (75 I.D. at 134, 135). This additional requirement is improper because it

affords an inadequate basis for comparison and improperly restricts the means of proof.

The basis for comparison is incomplete and misleading. If the intent of Congress is to be reflected properly, the price differential would have to be between the market price for stone from the deposit in question and stone from other deposits which lack not only the property alleged to give value to the deposit in question but any property giving them distinctive special value. Of perhaps more immediate importance is the refusal of the Department of the Interior under this formula to acknowledge the probative value of any evidence other than market value. That approach eliminates from consideration value which is due to ease of extraction and handling of material before it reaches the market. It also disregards other types of evidence which are obviously indicative of value, such as the fact that as here stone may be faster, easier and more economical to lay. (A. Tr. 122-123, 126-127).

It is not conceded that it is proper in any circumstances to limit proof of distinct and special value exclusively to evidence of a differential in market price. However, if such a requirement is imposed, there is nevertheless support in the record in this case for the position that evidence satisfying that requirement was submitted. Before the hearing examiner, Kenneth McClarty testified that a price of $40.00 to $45.00 per ton for stone from the Snoqueen deposit was readily accepted, but that common rock could be purchased at

from $6.00 to $7.00 maximum per ton. (A. Tr. 104). This testimony is not as explicit or detailed as might, with hindsight, be desired. Nevertheless, viewed in context it should be recognized as evidence of a comparison between the market price for building stone and the market price for common stone marketed for building purposes. The witness was shown to be engaged in lumber manufacture, the sale of building materials and home construction. (A. Tr. 96, 111). His testimony as to market prices appeared in the context of a discussion of the development and use of stone from the Snoqueen deposit as a building stone. The contestants did not by either cross examination or affirmative evidence attempt to refute the logical inference that both prices referred to sales of stone for building purposes. The use of the term "rock" by the witness does not warrant any inference that something other than common stone usable for building purposes was referred to inasmuch as the words "rock" and "stone" are virtually interchangeable, particularly where used in a colloquial sense. (See Addendum "B").

The Department of Interior's exclusive reliance upon the market value criterion is, of course, something which was not taken into consideration in this case by either the hearing examiner or the office of the Secretary of the Interior. The case certainly appears not to have been tried on such a theory before the hearing examiner in view of the obvious failure to fully develop the evidence which did come in relating to these points.

Further, even the Department of the Interior concedes that language used in its previous departmental decisions going as far back as *United States v. J. R. Henderson*, 68 I.D. 26 (1961) would lead one to conclude that any mineral deposit used for the same purposes as deposits of admittedly common varieties would be held to be a common variety. (75 I.D. at 133). In view of this it would seem that inasmuch as the new formula was stated apparently for the first time in April of 1968, if proof must be made strictly in terms of market value, then the claimant should be afforded an opportunity to provide such proof.

CONCLUSIONS

Although in its discussion of the *McClarty* case in the *U. S. Minerals* opinion, the Department of the Interior concedes that the Snoqueen deposit has unique characteristics which give it an economic advantage, it persists in its contentions that the stone from the deposit is identical to other stone in the area and that the deposit has no special value. These contentions are unsupported by the record, without common sense, and contrary to the competent evidence in the record.

The new formula expressed by the Department of the Interior in the *U. S. Minerals* case is contrary to the intent of Congress as expressed in 30 U.S.C. § 611 and the legislative history of that statute. The formula goes too far beyond the purpose of Congress which was to prevent abuses of the mining laws without materially

changing the basic concepts of those laws. The requirements of the formula that a deposit have a "unique" property and that stone from it either be put to uncommon uses or have value for common uses demonstrated exclusively in terms of a market price differential is unwarranted. The definition of the requisite market price differential improperly requires comparison with other deposits which may have different properties of their own giving them "distinct and special value."

Assuming without the conceding the propriety of these new requirements, the Snoqueen deposit, on the present record, should be found subject to location under the mining laws because of it unique nature, the unique uses to which stone from it has been put and the demonstration of its value in use by the testimony of the stonemason. Finally, the testimony viewed in context shows that even the market price differential required by the new formula exists.

Should the Court hold that a market price differential must be shown here and that the record is not developed sufficiently on that point, then the case should be remanded to take further evidence as to market price differentials in accordance with criteria which the Court holds to be consistent with the intent of 30

U.S.C. § 611 in light of the language of that statute, its legislative history and the continued existence of the building stone statute 30 U.S.C. § 161.

Respectfully submitted,
DONALD H. BOND
of HALVERSON, APPLEGATE
& MCDONALD
Attorneys for Appellant

CERTIFICATE

I certify that, in accordance with the preparation of this brief, I have examined Rules 28 and 32 of the Federal Rules of Appellant Procedure, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD H. BOND

ADDENDUM "A"

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

November 6, 1968

SEAL
Address Reply to the
Division Indicated
and Refer to Initials
and Number

RPM
90-1-4-125

AIR MAIL

Donald H. Bond, Esquire
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343 East "D" Street
Post Office Box 526
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Dear Mr. Bond:

Re: No. 21227 — Kenneth McClarty v. Udall

For your information, the following citation of authority has been furnished to the Clerk of the Court of Appeals for the Ninth Circuit for insertion in the Government's brief in the above-entitled case:

United States v. U. S. Minerals Development Corp., 75 I.D. 127 (Apr. 30, 1968).

Clyde O. Martz
Assistant Attorney General
Land and Natural Resources Division

By:

Roger P. Marquis
Chief, Appellate Section

ADDENDUM "B"

Webster's New Twentieth Century Dictionary,
Unabridged, (2d Ed.)
Page 1568

rock, *n.*[*OFr. roche;* cf.A.S.-*rocc*, ML.*rocca.*]

1. a large mass of stone forming a peak or cliff.

2. (a) stone in the mass; (b) broken pieces of such stone.

3. (a) mineral matter variously composed, formed in masses or large quantities in the earth's crust by the action of heat, water, etc.; (b) a particular kind or mass of this.

4. anything like or suggesting a rock, as in strength or stability; especially, a firm support, basis, refuge, etc.

5. any cause of wreck or destruction; as, the *rock* upon which one breaks: in allusion to a ship.

6. a kind of hard, insoluble, soapy compound formed by the action of lime on fats.

7. the rockfish.

8. the rock dove.

9. a type of hard candy. [Chiefly Brit.]

10. a stone, whether large or small. [Colloq. or Dial.]

11. (a) [*usually in pl.*] a piece of money; as, a pocket full of *rocks;* (b) a diamond or other gem. [Slang.]

on the rocks; (a) out of money; (b) in or into a condition of ruin or catastrophe. [Colloq.]

stone, *n.* [ME. *ston, stoon;* AS. *stan,* stone; akin to D. *steen;* Ice. *steinn;* Dan. and Sw. *sten;* G. *stein;* Goth. *stains;* the base *sti* also appears in Russ. *stiena,* a wall, and Gr. *stia,* a stone, pebble.]

1. the hard, solid, nonmetallic mineral matter of which rock is composed.

2. a piece of rock of relatively small size.

3. a piece of rock shaped or finished for some purpose; specifically, (a) a building block; (b) a paving block; (c) a gravestone or memorial; (d) a boundary mark or milestone; (e) a grindstone or whetstone.

4. something that resembles a small stone; specifically, (a) a hailstone; (b) a testicle; (c) a stonelike seed of certain fruits; specifically, the hard endocarp of a drupe, as of the peach; (d) [Obs.] a gunflint.

5. a precious stone or gem.

6. *pl.* **stone,** in Great Britain, 14 pounds avoirdupois.

7. in medicine, (a) a small stony mass abnormally formed in the kidney, bladder, or gall bladder; calculus; (b) a disease characterized by such formations.

8. in printing, a table with a smooth top, originally of stone, on which page forms are composed.

Arkansas stone; a fine-grained stone used for making hones; novaculite.

Caen stone; a kind of cream-colored limestone used for building; so-called because found near Caen, France.

meteoric stones; meteorites.

to cast the first stone; to be the first to censure, criticize, or attack.

to leave no stone unturned; to do everything that can be done.